No. 86-1677

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT W. HUISKAMP,

Petitioner,

—vs.—

NEW YORK CONNECTING RAILROAD COMPANY,

—and—

HORIZON TRUST COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Did the District Court and Court of Appeals err in holding, under state law, that the doctrine of res judicata barred relitigation of a bondholder's claims for interest over and above the specified bond rate, which were previously asserted by an indenture trustee on behalf of bondholders in litigation that raised the same issues, involved the same parties, and resulted in a final judgment after notice and an opportunity to be heard?

THE PARTIES

This statement is made pursuant to Rule 28.1 of this Court. The Penn Central Corporation ("Penn Central") is the successor by merger to the named Respondent, New York Connecting Railroad Company ("New York Connecting"). Respondent, Horizon Trust Company ("Horizon" or the "Trustee"), has no parent company. Neither Penn Central, New York Connecting, nor Horizon has any subsidiaries or affiliates which have any publicly held securities.

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COUNTER-STATEMENT OF THE CASE

This petition arises out of the affirmance by the Court of Appeals of the dismissal of diversity claims by Robert W. Huiskamp ("Huiskamp" or "Petitioner"), a former New York Connecting bondholder. It involves the application of established common law doctrine of res judicata to Huiskamp's claims concerning his former ownership of forty-three New York Connecting $1000 face amount, 2 7/8% Series B bonds. These bonds were originally issued to finance railroad construction under a First Mortgage dated October 1, 1940 (the "Trust Indenture" or "First Mortgage"). A lawsuit in 1976 by the Indenture Trustee on behalf of all the bondholders resulted in a consent judgment liquidating the amounts owed to the bondholders under the Trust Indenture. The obligation to the bondholders was later satisfied by means of a tender offer for the bonds which implemented a 1979 court approved settlement, after notice and a hearing in the Penn Central Reorganization Proceedings, No. 70-347 (E.D. Pa.).

Huiskamp claimed in the district court that New York Connecting defaulted on the bonds' principal payments due on October 1, 1975, and interest payments due after June, 1970.[1]

He redeemed all of his bonds after filing suit on March 20, 1985. He was paid the full principal amount plus accrued interest and interest on interest at 2 7/8%. Thus, Huiskamp was paid all that was due him under the terms of the First Mortgage, but he still continued this case in the hope of obtaining a recovery involving a higher rate of interest than the Trust Indenture provided. The district court granted respondents' motion for summary judgment, and the Court of Appeals affirmed.

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1 The complaint also charged that Horizon breached a fiduciary duty to bondholders by, among other things, failing to keep bondholders apprised of their rights and to protect bondholder rights.

Petitioner's statement of facts makes almost no reference to the opinions of the courts below, and in numerous instances omits material facts of record. The facts as found and recited in the lower court opinions are virtually undisputed.[2] Moreover, the lower courts had before them all of the facts obtained in discovery that bore on Huiskamp's claims.

1. Penn Central's Reorganization and the Default By New York Connecting On The 2 7/8% Series B Bonds.

Huiskamp formerly owned forty-three New York Connecting 2 7/8% Series B Bonds. The rate of interest borne by these bonds was 2 7/8%. (A-1 and 2; 260a).[3] The Trust Indenture specified in Article Seven that the amount of interest to be paid in the event of default is fixed at the same rates of interest borne by the bonds. (A-13 and 14; 132a-35a; 135a-36a; 140a-41a; 142a).

The bonds were guaranteed by a Penn Central predecessor, to which New York Connecting had leased its rail lines for a long term, at rentals calculated to enable the amortization of bonds and payment of dividends. Such long-term railroad leases were frequently used to finance the necessary construction and to consolidate operations, while avoiding the legal and practical obstacles to railroad mergers. (A-2 and 3).

On June 21, 1970, Penn Central filed for reorganization. The Honorable John P. Fullam, Chief Judge of the United States District Court of the Eastern District of Pennsylvania (and the district court below in this case) presided over the reorganization.[4]

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2 Where disputed, the lower courts viewed the facts, on this motion for summary judgment, in a light most favorable to Huiskamp.

3 Citations designated as "A-" refer to the Appendix attached to Huiskamp's Petition for Writ of Certiorari. Citations designated with an "a" refer to the Appendix in the Court of Appeals.

4 Huiskamp inaccurately refers to actions of a "bankruptcy court" throughout his petition. Penn Central's reorganization was before a United States District Court, sitting as a Reorganization Court under Section 77, *Reorganization of Railroads Engaged in Interstate Commerce*, of the Bankruptcy Act. 11 U.S.C. § 205. *See*, 5 *Collier on Bankruptcy*, ¶ 77.11 (1978 and 1986 Supp.).

As a result of Penn Central's bankruptcy, fourteen railroad lessors similar to New York Connecting also entered reorganization. (A-4 and 5). Although New York Connecting did not reorganize, it was clear that the only assets available to satisfy its obligations were from the Penn Central estate. (*Id.*; 289a-92a; 308a; 293a, 301a; 365a-79a). This was so because the Reorganization Court in Order No. 1 enjoined all parties from enforcing liens on property owned or in the possession of Penn Central. Accordingly, no action could be taken by the Trustee to enforce the bonds or the mortgage under the Trust Indenture. (185a-89a). If such action were taken, it would have precipitated New York Connecting's bankruptcy and forced it to join other secondary debtors. (A-12 and 13). Furthermore, Penn Central had claims against New York Connecting for operating the leased property at a deficit. Given the reorganization proceedings, neither Penn Central nor New York Connecting paid the principal when the 2 7/8% Series B Bonds matured on October 1, 1974, or the coupon interest payments that became due after June, 1970 (210a).

2. The 1976 Lawsuit and Consent Judgment For $21,247,989.00 On Behalf of Bondholders Like Huiskamp.

On June 25, 1976, while the Penn Central reorganization was still pending, Horizon (as the Bank of New Jersey) sued New York Connecting on behalf of bondholders, including Huiskamp, in the United States District Court for Southern District of New York, 76 Civ. 2804. (The "Trustee's Suit"). That case raised the same basic claim presented by Huiskamp in this case: liability on the bonds arising from the default on payments of principal and interest due on the 2 7/8% Series B bonds. The complaint sought judgment of $20,808,737 and interest thereon at 2 7/8% from October 1, 1975, the date of the default on principal payments. (256a-58a). The action was brought as a protective measure to preserve bondholders' rights against a claim that the statute of limitations against bondholders had or would run out. (271a-72a; 274a-75).

The Trustee and New York Connecting resolved the litigation via a consent judgment subject to a stipulation consenting to the entry of a judgment in the Trustee's Suit, on June 25, 1976. The stipulation was based on two conditions: (1) the judgment would not be enforced against New York Connecting without approval of Judge Fullam, as the Penn Central Reorganization Court, or a decree from the Reorganization Court that approval was not required; and (2) the consent judgment was not a waiver of the right of Penn Central to contend that neither the interest in default nor the interest on interest should be paid by New York Connecting or Penn Central. (A-7; 181a-82a; 286a).

A consent judgment in the amount of $21,247,989 was entered on June 29, 1976, in the Trustee's Suit. The interest rate on the overdue amounts under this judgment was 2 7/8%. The consent judgment specifically incorporated the June 25, 1976 stipulation. (215a-18a; 195a-98; 204a-05a; 289a). Huiskamp's petition does not anywhere refer to the stipulation in the Trustee's Suit and only makes passing reference to the consent judgment. (Petition at 3 and 4). Yet these two uncontroverted facts—particularly the condition that the consent judgment would not be enforced against New York Connecting without approval of Judge Fullam as the Penn Central Reorganization Court—are central to the holdings of the courts below. (A-12 to A-14).

The Trustee sent notice of the Trustee's Suit and the judgment for $21,247,989 to the bondholders on August 27, 1976. (289a-92a).

The district court found that "[t]here can be no contention that it was improper for the indenture trustee to agree to the terms of this consent judgment". (A-12).[5] The court concluded further that all of the assets which would have been used to collect the judgment were "within the control of the Penn Central bankruptcy proceeding and about to be conveyed to ConRail under the aegis of the Special Court"; and, moreover,

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5 This is supported by the uncontroverted record. Article Seven, Section 3 of the Trust Indenture authorized the Trustee to act on behalf of bondholders in the event of default. (137a).

"any attempt to enforce the judgment would undoubtedly have precipitated the bankruptcy of New York Connecting". (A-12).

3. Summary Judgment Was Granted In Favor of New York Connecting In A Class Action By Bondholders.

Similar issues to those raised in this case were also presented in a class action in 1976 by bondholders in *Sylvia Friedman, on behalf of all holders of New York Connecting Company, First Mortgage, series B 2&7/8% Bonds due October 1, 1975* v. *New York Connecting R.R. Co.*, Index No. 1230/76 (Supreme Court of New York). There, the court granted summary judgment for New York Connecting and against the bondholders on the grounds that the Trustee had already obtained the consent judgment in the Trustee's Suit. (624a-26a).

4. Conveyance of Rail Properties to ConRail and Consummation of the Penn Central Reorganization.

During the Penn Central Reorganization, effective April 1, 1976, New York Connecting along with Penn Central and other transferors conveyed substantially all of their rail properties to Consolidated Rail Corporation ("ConRail"), pursuant to the Regional Rail Reorganization Act of 1973 ("The Rail Act"), 45 U.S.C. §§ 701-797. (190a-91a).[6] The Rail Act mandated that payment for the conveyed rail property was to be in the form of certificates of value bearing interest at 8% per year from and after April 1, 1976. (A-6; 45 U.S.C. §§ 743, 746). After this transfer, New York Connecting had no real property or rail lines. Its principal asset was a claim in the Valuation Case, a proceeding before a Special Court established under the Rail Act for compensation for the properties conveyed to ConRail pursuant to the Rail Act. 45 U.S.C. § 743(c); *In the Matter of*

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6 The purpose of the Rail Act was to effect a restructuring of Northeastern U.S. railroads. The Rail Act amended Section 77 of the Bankruptcy Act (formerly 11 U.S.C. § 205) particularly with respect to the role of the Interstate Commerce Commission, and left to the Reorganization Court the task of reorganizing Penn Central's retained non-railroad assets.

the Valuation Proceedings Under §§ 303(c) and 306 of the Regional Rail Reorganization Act, No. 76-1 (Special Court). Bondholders were notified of these developments in a letter to bondholders dated, August 27, 1976, and in tender offer documents dated December 10, 1979. (289a-92a; 365a-79a).

On March 17, 1978, the Reorganization Court approved the Amended Plan of Reorganization for Penn Central Transportation Company (A-6).[7] During the same time, Penn Central had extensive discussions and negotiations with representatives of non-bankrupt lessors, such as New York Connecting, to achieve acceptable resolutions of outstanding claims. (A-6 and 7). And of course, by this time a consent judgment had been entered in the Trustee's Suit under which New York Connecting and the Trustee, on behalf of the bondholders, agreed to seek enforcement of the consent judgment in the Reorganization Court.

5. The 1979 Court Approved Settlement Provided For Satisfaction of Bondholder Claims Through A Tender Offer, Or That Those Electing Not To Tender Would Be Satisfied Under The Terms Of The Trust Indenture.

Shortly after the consummation of the Penn Central Reorganization Plan, Penn Central, New York Connecting and the Trustee on June 19, 1979, petitioned the Reorganization Court for approval of an independently negotiated settlement agreement governing bondholders' claims. This provided for Penn Central to make a tender offer to acquire the 2 7/8% Series B bonds, and that those failing to tender would have their claims satisfied, as provided by the Trust Indenture, from proceeds

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7 The terms of the Plan, among other things, provided for the satisfaction of claims of Penn Central's secured creditors, such as bondholders. Such creditors, including bondholders, received a "10-triple-30" form of distribution: 10% cash and 30% in each of three types of securities—mortgage bonds, preferred stock and common stock. (A-6).

obtained in the Valuation Case. (A-8 to A-10; 308a; 293a-327a).[8]

The Reorganization Court ordered a hearing date of July 17, 1979, and required that each bondholder be mailed written notice of the Petition for Approval of the Settlement Agreement, the terms of the settlement agreement and the court's Order. (308a). This was done on June 20, 1979 when copies were mailed to the bondholders—including Huiskamp, Huiskamp's father and Huiskamp's brother/lawyer of record in this case, John S. Huiskamp, Esquire. (A-14; unnumbered page between 327a and 328a; 336a-37a; 261a-62a).

On June 26, 1979, John S. Huiskamp, Esquire, acknowledged receipt of the proposed settlement. (356a).

A hearing on the Petition for Approval of the Settlement Agreement was held on July 17, 1979. Bondholders had the opportunity to present any objections to the Petition and, in fact, some appeared and were heard. But, Huiskamp (and the other members of his family including his lawyer) failed to assert any objections. (A-14 to A-17; 263a-64).

By letter dated September 21, 1979, Huiskamp through his lawyer inquired about the court's disposition of the Petition for a Settlement Agreement. (362a). He was notified that no action had been taken. (363a).

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8 Section 8 of the settlement agreement governs non-tendering bondholders and provides in pertinent part (301a):

> 8. *Treatment of Bonds Not Acquired by Penn Central.* In the event that Penn Central acquires some but not all of the New York Connecting Bonds pursuant to the tender offer, the amounts which may be due holders of New York Connecting Bonds that are not so acquired *shall be satisfied, as provided in the First Mortgage* and subject to the provisions of paragraph 6 of this Agreement, out of the proceeds of the the recovery of New York Connecting and the Valuation Case and any other assets of New York Connecting available for that purpose.

(Emphasis added throughout unless indicated to the contrary).

On October 1, 1979, in Order No. 4003 of the Penn Central Reorganization, the court approved the Petition and the Settlement Agreement after notice to the bondholders and other interested parties and the hearing. (A-8; 364a).

Pursuant to the October 1, 1979 Order, Penn Central implemented a tender offer dated December 10, 1979. (365a-79a; 223a; 199a-200a; 206a). Under the court approved tender offer, holders of New York Connecting 2 7/8% Series B bonds, such as Huiskamp, were given the opportunity to have their claims satisfied under essentially the same "10-triple-30" package which the reorganization plans of Penn Central and the secondary debtors gave to other secured creditors. (365a-79a, A-8). Every other member of Huiskamp's family that held bonds tendered them and accepted this "10-triple-30" package which, with the passage of time, became more valuable. The settlement agreement and tender offer specified, however, that those choosing not to tender their bonds would be entitled to have their claims satisfied "as provided in the First Mortgage [the Trust Indenture]" from a *pro rata* share of any assets of New York Connecting available for that purpose, including any recovery of New York Connecting in the Valuation Case (A-8 and 9; 295a-307a; 365a-79a), which at that time was New York Connecting's only asset.

Huiskamp admits that, between 1972 and the time of the tender offer in 1979, he actively read everything that was sent to him regarding the New York Connecting 2 7/8% Series B bonds, but that he did "nothing". He neither made any demands nor asked the Trustee to act on his behalf. (263a-64a). He chose not to tender his bonds even though his father and his lawyer tendered their bonds. (A-8; 631a; 261-62a).

On November 16, 1980, the Valuation Case settled. On December 4, 1980, the Special Valuation Court approved a settlement agreement among Penn Central and its subsidiaries, the United States Railway Association and the United States of America concerning the amount to be paid under the April 1, 1976 conveyance to ConRail. Thus, a fund was created from which claims of bondholders who failed to tender could be

satisfied. On January 28, 1981, New York Connecting notified remaining shareholders of the 2 7/8% Series B bonds of the availability of funds to pay obligations to them. (380a-83a; 225a-28a).

6. Huiskamp "Was Kept Fully Informed Of Developments" Concerning His Rights As A Bondholder From April 1975 Onward.

Huiskamp and his brother/counsel were continuously advised and assisted by the Trustee and Penn Central regarding their rights as bondholders. As the district court found: "The record makes clear that [Huiskamp] was in fairly frequent contact with the indenture trustee and its counsel, and was kept fully informed of developments." (A-14). This finding is amply supported by the undisputed record:

(a) As early as March and April of 1975, Huiskamp's lawyer advised counsel for New York Connecting and the Bank that he and other members of his family held a substantial amount of New York Connecting bonds. On behalf of his family members, he requested information about action taken to protect their interest as bondholders. (384a-86a).

(b) By letter dated April 9, 1975, the Trustee's counsel notified Huiskamp's lawyer that the Reorganization Court had enjoined the Trustee from instituting foreclosure proceedings authorized by virtue of the default on the mortgage. (387a).

(c) By letter dated August 27, 1976, the Trustee notified bondholders like Huiskamp of the Trustee's Suit and judgment of $21,247,989. It also invited bondholders to provide notice of whether they desired a meeting to "discuss the issues and determine if concerted action on their behalf is appropriate and the means of pursuing such action". (289a-92a). Notice of the meeting was sent on February 9, 1977. (388a). The Huiskamps were aware of this meeting which was held in New York on February 23, 1977, but were unrepresented because their "attorney in New York was unable to attend the meeting at Morgan Guaranty Trust due to a conflict in his schedule". (389a-90a; A-14).

(d) The Trustee's counsel responded to a request from Huiskamp's lawyer for a status report on the bonds (389a-90a), and explained in part that (404a):

> No foreclosure action against the property of New York Connecting was possible, inasmuch as such action was specifically enjoined by the Reorganization Court. By virtue of the compelled conveyance under the Rail Act, substantially all of the property of New York Connecting was transferred to ConRail free and clear of all liens. We have filed and been granted leave to intervene in the proceedings before the Special Court which is required under the provisions of the Rail Act to determine whether the designated value of the property conveyed to ConRail is adequate.

It was further explained that:

> No action was taken for use and occupancy of the property of New York Connecting for multiple reasons, among which is the fact that the line was operated by Penn Central at a loss and that operational losses are to be paid prior to payment of the mortgage obligation.

(e) Huiskamp's lawyer thereafter requested additional information regarding the bonds and the Penn Central reorganization. (389a-90a). Counsel for the Trustee responded by letter dated March 2, 1977. (417a).

(f) Penn Central's Plan of Reorganization was sent to bondholders by the Trustee on March 7, 1977. (391a).

(g) By letter dated March 16, 1977, Huiskamp's counsel in this case notified the Trustee's lawyers that (392a-93a):

> We are currently in the process of identifying the bonds which are held by our family for the court so that we may be in a position to vote on the New York Plan of Reorganization—we hold a block of $359,000 par value bonds. We contemplate filing a statement of position in addition to voting. We understand that these statements of positions must be filed by March 31, 1977. With this in

> mind, we would appreciate knowing what position you intend to take on behalf of New York Connecting Railroad Company, and the form in which you intend to assert the position of the company. We do not wish to take any position which would be contrary to those taken by you, to the extent we believe your position to be correct.

Moreover, he specifically inquired about the precise issues raised in this case (393a):

> The claim for interest due resulting from nonpayment of the New York Connecting Railroad bonds when due (prior to October 1975 the rate of interest was 2 7/8%; on default, however, the bonds are payable at a higher rate; *at what rate are you claiming interest due after default*).

(h) Counsel for the Trustee responded on March 22, 1977, by explaining the Trustee's Suit and its judgment, and that under the Trust Indenture the unpaid amounts were subject to the same rate as that borne by the bonds. (395a-96a):

> The Bank of New Jersey, as Indenture Trustee, on behalf of all bondholders brought a proceeding in the United States District Court, Southern District of New York, against New York Connecting for a judgment on the bonds and mortgage. A judgment in the sum of $21,247,989.00 with interest was obtained representing unpaid interest to June 25, 1976 and matured principal. The Trustees of Penn Central agreed to a consent judgment so that we would preserve our lien. *The indenture provides, however, that interest on overdue payments shall be at the same rate borne by the bonds which are overdue.*

Huiskamp and his lawyer neither objected to this, disputed it, nor claimed that this constituted a breach of any duty by the Trustee.

(i) By letter dated April 11, 1978, the Trustee notified holders of 2 7/8% Series B bonds about the approval of the Penn Central Plan of Reorganization, and that provision for

their claims was not included in the Plan but that notice and the opportunity to accept any settlement proposal would be sent. (397a-99a).

(j) By letter dated February 6, 1979, Huiskamp's lawyer made further inquiry regarding the status of the New York Connecting Bonds. (400a). He was advised by letter dated February 13, 1979 that treatment of the claims of the bondholders was still under discussion and that all bondholders would be advised of developments affecting the status of the bonds. (401a).

(k) In June 1979, the Trustee sent Huiskamp and his lawyer notice of the petition for approval of the settlement agreement, the July 17 hearing on that petition and the tender offer. (unnumbered page between 327a and 328a; 336a-37a). [9]Huiskamp failed to present any objections at the hearing. But, before the hearing Huiskamp's lawyer acknowledged receipt and inquired about the Trustee's position on the value of the assets in the Valuation Case "[i]n order to evaluate the proposal". (356a). This and other inquiries were answered by letter dated July 3, 1979. (359a-60a).

(l) After declining to accept the tender offer, from 1981 through 1984, Huiskamp continued to request and to receive advise from the Trustee and Penn Central regarding his rights. (406a-16a).

7. Huiskamp Redeemed His Bonds For The Full Principal Amount Plus Accrued And Past Due Interest At 2 7/8%.

After filing this suit, Huiskamp redeemed his New York Connecting 2 7/8% Series B bonds. On July 25, 1985, he was paid $58,704.46. This sum represents the amount of unpaid

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9 Notice was not only mailed to each bondholder, pursuant to court order it was also published in The Wall Street Journal, New York Times, Washington Post and newspapers of general circulation in each state in which bondholders were known to reside. (308a).

principal and coupon interest, as well as interest at 2 7/8% on those amounts. (632a; 440a, 241a-42a, 249a-55a).

Based on the foregoing, the district court found that there was an absence of any genuine issue of material fact and that Penn Central and Horizon were entitled to judgment as a matter of law pursuant to Rule 56. More specifically, the district court held that Huiskamp's claims were barred by res judicata and alternatively, undue delay in asserting his claim.[10] The Third Circuit agreed and affirmed.

REASONS FOR DENYING THE PETITION

I. THE PETITION FAILS TO SATISFY RULE 17.1(a) - (c) OF THIS COURT BECAUSE IT PRESENTS NO SPECIAL OR IMPORTANT REASONS FOR GRANTING REVIEW ON A WRIT OF CERTIORARI.

Rule 17.1 of this Court provides that review on writ of certiorari is a matter of discretion that "will be granted only when there are special and important reasons therefor". It lists three categories of reasons, including (a) conflict between federal circuit courts of appeals; (b) conflict between the decision of a state court of last resort on a federal question and that of another state court of last resort or a federal court of appeals; and (c) when a state court or federal court of appeals has "decided a federal question in a way in conflict with applicable decisions of this Court".

None of the foregoing reasons are present here. Instead, Petitioner urges that the collective decision of the lower courts "transports the doctrine of *res judicata* far beyond the limits which the Supreme Court has imposed". (Petition at 7-8). He then explains further that "[i]n applying the doctrine of *res judicata* to the present facts, the opinions below have come

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10 Summary judgment was also granted for the Trustee against Huiskamp's claims for breach of fiduciary duty in the district court, and this too was affirmed by the Third Circuit.

into conflict with well-established Supreme Court rules and decisions". (*Id.* at 10).

Thus, Huiskamp does not contend that there has been a decision or ruling involving a "federal question" applied in a way that conflicts with Supreme Court decisions as required by Rule 17.1(c). This case, which has its federal jurisdiction based on diversity, only involves an analysis of the uncontroverted facts under the applicable state common law doctrine of res judicata.[11] The petition thus presents no special or important reasons for granting review—indeed it raises no federal question at all—and it should be denied. *See, e.g., United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 226-27 n.2, 95 S. Ct. 926, 929 n.2 (1975); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 75 S. Ct. 614 (1955).

II. THE COURTS BELOW PROPERLY STATED AND APPLIED THE DOCTRINE OF RES JUDICATA IN THE CONTEXT OF UNDISPUTED RECORD FACTS.

The courts below fully considered Huiskamp's contention that res judicata is not a bar to his claims. The district court rejected that contention and properly held that "plaintiff's claims in this action are precluded by the *res judicata* effect of Order No. 4003 in the Penn Central reorganization proceeding, approving the settlement agreement". (A-13).

The Third Circuit affirmed, holding that (A-22-23):

> The district court held that Order No. 400[3] is a final judgment binding on Huiskamp, and that his claim is barred by res judicata. We agree that there was identity of claims, identity of parties, and opportunity to be heard, and a final judgment. Thus we agree that Order No. 400[3] binds Huiskamp.

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11 The choice of law in this diversity action is between the common law of Pennsylvania, which is the forum state, and New York, which under the Trust Indenture governs disputes concerning the New York Connecting 2 7/8% Series B bonds. (Article 11 § 1(o), .161a). No real conflict exists, however, because the common law of res judicata is the same in each jurisdiction.

Res judicata bars relitigation. *See, e.g., Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1933); *Mother's Restaurant, Inc.* v. *Mamma's Pizza, Inc.*, 723 F.2d 1566, 1569 (Fed. Cir. 1983); *Alexander & Alexander, Inc.* v. *Van Impe*, 787 F.2d 163, 165-66 (3d Cir. 1986); *Expert Electric, Inc.* v. *Levin*, 554 F.2d 1227, 1232 (2d Cir.), *cert. denied*, 434 U.S. 903 (1977).

This doctrine embodies the fundamental common law precept that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in subsequent suit between the same parties or their privies". *Montana* v. *United States*, 440 U.S. 147, 153 (1979), *quoting*, *Southern Pacific R.R. Co.* v. *U.S.*, 168 U.S. 1, 48-49 (1897). *Accord*, *United States* v. *Mendoza*, 664 U.S. 154, 158n.3, 104 S. Ct. 568, 571n.3 (1984).

As this Court explained in *Commissioner* v. *Sunnen*, *supra*, 333 U.S. at 597:

> The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereby bound "not only to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell* v. *County of Sac*, 94 U.S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.

Accord, *In re: Teltronics Services, Inc.*, 762 F.2d 185, 190 (2d Cir. 1985) (claims barred by settlement between trustee in bankruptcy and principal creditor, which was approved by the court); *Harris* v. *Pernsley*, 755 F.2d 338, 342 (3d Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S. Ct. 331 (1986).

Huiskamp does not take issue with the foregoing standards. Instead, Petitioner argues that the application of the doctrine of res judicata to the facts of this case did not warrant

dismissal. Such a determination, however, is best left for the lower courts. Also, all of the points raised in Huiskamp's Petition were fully and correctly resolved under the foregoing standards.

A. Identity of Claims Existed.

All of the claims in this case were raised or could have been raised in the Trustee's Suit (for defaulting on payments of principal and interest under the Trust Indenture), or at the 1979 hearing on the court approved settlement agreement which resulted in a tender offer that satisfied all bondholder claims.

Huiskamp makes two arguments: (1) that there was no identity of issues because the "purpose of the bankruptcy petition was to authorize Penn Central's tender offer"; and (2) that "[t]here was no reason for the bankruptcy court to determine or change the judgment creditors status of the [New York Connecting] bondholders" and the "issue in the second suit (whether the bondholders are judgment creditors) was never discussed in the bankruptcy order". (Petition at 13). Thus, Huiskamp does not claim that an improper legal standard for res judicata was applied. Rather, he disagrees with the factual determinations made by the district court, and affirmed by the third circuit, when applying the law to the unique facts of this case.

Huiskamp's first argument, however, amounts to revisionist history. The purpose of the July 17, 1979 hearing was to approve the settlement agreement among New York Connecting, Penn Central and the Trustee (on behalf of the bondholders) resolving bondholder claims on the default. This settlement was to be implemented by a tender offer, or by payment from the Valuation Case for those electing not to tender their bonds. But, contrary to Huiskamp's argument, there is no evidence that the 1979 proceeding was narrowly confined to the tender offer. All of Huiskamp's issues could have been addressed had he chosen to raise them.

Furthermore, Huiskamp's inaccurate presentation of the undisputed facts ignores the entry of the June 29, 1976 consent judgment and the fact that Huiskamp received notice of the settlement agreement, its purpose and the hearing scheduled on it. If he disputed what he now claims was a change in status, his remedy was to object at the hearing.

Based on the uncontroverted record, the district court found that there was an identity of claims because "[t]he indenture trustee did file suit, in a New York court, when the principal default occurred in 1975" (A-12) and that "[t]he litigants then negotiated a consent decree, under which the entry of judgment for the balance then due on the bonds was conditioned upon the agreement that leave of this court would be required before any attempt was made to enforce the judgment." (A-12; see also, 286a-87a; 215a, 218a; 195a-98a; 203a-05a). The district court then concluded that (A-12):

> There can be no contention that it was improper for the indenture trustee to agree to the terms of this consent judgment. Not only were *all of the assets* which might have been looked to for collection of the judgment within the control of the Penn Central bankruptcy proceedings and about to be conveyed to ConRail under the aegis of the Special Court, but any attempt to enforce the judgment would undoubtedly have precipitated the bankruptcy of New York Connecting (*i.e.*, it would have joined the other secondary debtors).[12]

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12 Huiskamp erroneously challenges the Reorganization Court's jurisdiction over the parties and subject matter. (Petition at 11). The record, however, conclusively establishes that jurisdiction existed. First, New York Connecting and the Trustee agreed to have bondholder claims approved before the Reorganization Court by the June 29, 1976 consent judgment. (202a-03a). Such bondholder claims were in fact approved by court order, after notice and a hearing, in a representative proceeding before the Reorganization Court, which served as a forum for hearing and approving the voluntary proposals to satisfy bondholder claims. (A-6 to 9). Second, all of the assets of New York Connecting, as well as Penn Central's claims against New York Connecting for operating the leased property at a deficit, were

As to Huiskamp's second argument, there was no modification of the rights of the non-tendering bondholders. They continued to be entitled to precisely the rights under Section 13 of the Trust Indenture, no more, no less: accrued and past due interest at 2 7/8%.[13] In fact, the consent judgment fixed interest from the time of default until the date of the judgment at a rate of 2 7/8% per year—the same rate as the contract rate. The judgment also was expressly conditioned on its not being a waiver of the right to contend that neither the interest in default nor the interest on interest should be paid. (286a-87a; 181a-82a; A-12). Given the foregoing, bondholders simply did not have typical "judgment creditors rights" concerning interest.

Further, though the record is devoid of any evidence of a modification of bondholder rights, it is plain that Huiskamp and the other bondholders were "kept fully informed of developments" concerning bondholder rights and that his remedy was to object at the hearing approving the settlement. (A-14; see pp. 9 to 12 *supra*).

B. Identity of Parties Existed.

There is an identity of parties between this case, the Trustee's Suit and the settlement proceedings. "Generally speaking, one whose interests were adequately represented by another vested with the authority of representation is bound by the judgment, although not formally a party to the litigation."

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within the control of the Reorganization Court. (A-3 to 5). Third, Huiskamp's belated efforts to collaterally attack the jurisdiction of the Reorganization Court are improper. If he contested that court's jurisdiction, he should have done so at the hearing on the settlement. Moreover, approval of the settlement agreement was not "incidental" as Huiskamp suggests. (Petition at 11). Rather, that was the very core of the petition to the reorganization court to approve the settlement.

13 The issue of whether the settlement agreement somehow modified the rights of the bondholders or was improper under Article Seven, § 15 of the Trust Indenture was never raised in the district court and should not be considered now. *See* discussion at page 20 *infra*.

Expert Electric Inc. v. *Levine*, *supra*, 554 F.2d at 1233. *Accord*, *Chicago R.I. & P. RY. Co.* v. *Schendel*, 270 U.S. 611, 618 (1927); *Mother's Restaurant, Inc.* v. *Mamma's Pizza, Inc.*, *supra*, 723 F.2d at 1572; *Aerojet-General Corp.* v. *Askew*, 511 F.2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975). Huiskamp was in privity with the Trustee in the Trustee's Suit because it was brought on behalf of all the bondholders.

Huiskamp contends that he "was clearly not present, therefore he would be bound only if the Trustee was a party entitled to represent him in [the proceedings before the Reorganization Court]". (Petition at 13). However, the Trustee was specifically authorized by Article Seven, Section 3 of the Trust Indenture to act on behalf of bondholders, such as Petitioner, in the event of default. (137a). Indeed, the Trustee's Suit was brought to protect bondholders by tolling the running of the applicable statute of limitations on the default. Huiskamp was well aware of the Trustee's Suit and the Trustee's actions on his behalf, but he never sought to intervene personally or to object to the Trustee's action.[14]

Huiskamp alternatively argues that there was a "conflict" in the Trustee's representation of tendering and non-tendering bondholders, because the settlement agreement protected those who tendered but eliminated "judgment creditor rights" of those who did not. (Petition at 14 and 15). No conflict existed. First, as seen above, the non-tendering bondholders lost no judgment creditor rights. Second, the Trustee protected non-tendering bondholders by giving them the option to recover from New York Connecting's claim in the Valuation Case.

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14 Huiskamp relies on *Robinson* v. *First National City Bank*, 482 F. Supp. 92 (S.D.N.Y. 1979), to argue that res judicata is inapplicable, but that case is inapposite. Unlike this case, the plaintiffs in *Robinson* were *not* authorized representatives and had no authority to bind a class of shareholders who were not present at the prior Penn Central reorganization proceedings. No class had been ceritified, so the absent class members received no notice of prior Penn Central reorganization proceedings in which the plaintiffs had individually asserted their claims. That is substantially different from this case in which the Trustee was authorized to act for bondholders by the Trust Indenture, and the bondholders received repeated notices and had opportunities to be heard.

Huiskamp consciously elected to risk this option, while the other members of his family who tendered did not. Third, his purported conflict issue lacks support: he had full notice of the terms of the settlement agreement and the tender offer and the option of not tendering to obtain a claim in the proceeds from the Valuation Case, but that he never objected or raised an issue of this newly claimed conflict.

Further, Huiskamp never raised these claims in either the district court or the court of appeals. They should not be entertained now. *Singleton* v. *Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 2877 (1976); *Hormel* v. *Helvering*, 312 U.S. 352, 556, 61 S. Ct. 719, 721 (1941). Huiskamp had every opportunity to raise issues in his pleadings and summary judgment submissions before the district court which had the entire record before it.

C. A Final Judgment Existed.

There unquestionably was a final judgment on the merits given the consent judgment and the district court's approval of the settlement agreement in Order No. 4003 into which the consent judgment was merged. (364a; see pp. 3-5, 6-9, 14, *supra*). It is well established that settlement agreements approved by the court have the same force and affect as final judgment on the merits and bar suits seeking to relitigate similar claims. *In re: Teltronics Services Inc.*, *supra* 762 F.2d at 190; *Belefonte Re Insurance Co.* v. *Argonaut Insurance Co.*, 581 F. Supp. 241, 243 (S.D.N.Y. 1984), *aff,d on other grounds*, 757 F.2d 523 (2d Cir. 1985); *Bostic Foundry* v. *Lindberg*, 797 F.2d 280, 283 (6th Cir. 1986).

D. An Opportunity to be Heard Existed.

Huiskamp had a full and fair opportunity to litigate the claims and question the prior action. For instance, on August 27, 1977, the Trustee invited bondholders to meet and discuss whether "concerted action" should be taken by the bondholders. (289a-92a; A-14). After describing the Trustee's Suit and the judgment of $21,274,989, the Trustee stated:

> There are many factual and legal uncertainties that exist in the Special Court and Bankruptcy Court proceedings. The amount to be received ultimately for the property taken by ConRail is wholly uncertain and may not be known for many years. The status of the lease between Connecting and Penn Central and the agreement by which Penn Central has guaranteed payment of the Bonds has yet to be determined. The status of Connecting bondholders under the Proposed Plan of Reorganization is unclear. If the holders of twenty five percent (25%) in original principal amount of Bonds so request, the Trustee will call a bondholders meeting so that the bondholders may discuss the issues and *determine if concerted action on their behalf is appropriate* and the means of pursuing such action. If you desire such a meeting, please sign and return the enclosed form.

Huiskamp failed to attend or to be represented because his New York lawyer had a conflict in his schedule. (389a-90a; 635a).

Similarly, Huiskamp and his lawyer received notice of the hearing on the proposed settlement and failed to raise any objection. As the district court noted, "Plaintiff, whose attorney is his brother, was notified of the hearing on the proposed settlement agreement, and should have registered his objections, if any, at the time." (A-14).

Furthermore, Huiskamp received a copy of the tender offer but took no action. (263a-64a). Indeed, as the district court found "[a]t no time until after approval of the settlement agreement and implementation of the tender offer, did [Huiskamp] ever complain of the conduct of the indenture trustee or lodge any objection with this court." (A-14 and 15).

Finally, the district court held that: "[i]f some other alternative were deemed more equitable, that objection should have been raised at that time. After approval of the settlement agreement, and reliance thereon by so may parties, it would plainly be inappropriate to attempt to restructure the transaction". (A-16).

Huiskamp was properly precluded from raising the same claims in this case that were or could have been previously decided. " '[N]o significant harm flows from enforcing the rule that affords a litigant only one full and fair opportunity to litigate an issue, and . . . there is no sound reason for burdening the courts with repetitive litigation.' " *United States* v. *Mendoza*, *supra*, 464 U.S. at 159, 104 S. Ct. at 572, *quoting*, *Standefer* v. *United States*, 447 U.S. 10, 24 (1980).

CONCLUSION

Huiskamp's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit should be denied.

1. He fails to raise any important or significant federal issues as required by Rule 17.1.

2. The district court and court of appeals correctly applied the established common law standards for res judicata. Huiskamp's petition simply raises factual disputes with the

district court's findings, which were reached on the uncontroverted record.

Respectfully submitted,

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